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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

FARHAD SOROUSHIRN,

Defendant-Appellant.

Case No. ~~11540~~ 14421

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE RONALD O. HYDE, JUDGE, PRESIDING.

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FILED

AUG 2 - 1977

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. FARHAD SOROUSHIRN, Defendant-Appellant.	Case No. 11540

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE RONALD O. HYDE, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. FARHAD SOROUSHIRN, Defendant-Appellant.	Case No. 11540

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant was charged with Possession of a Controlled Substance to wit: Marijuana and convicted by a jury, the Honorable Ronald O. Hyde presiding. From the conviction, he appeals.

DISPOSITION IN LOWER COURT

The Appellant was charged by complaint with the misdemeanor of Possession of a Controlled Substance in violation of Section 58-37-8(2) (a) (i), Utah Code Annotated (1953) as amended. The case was tried to a jury with the Honorable Ronald O. Hyde, Judge, Second Judicial District for Weber County, presiding. The Appellant was found guilty of Possession of a Controlled Substance and fined $100.00.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the conviction and/or a new trial.

STATEMENT OF FACTS

In the early morning hours of July 3, 1977, Mr. Djafar Tawakoli, a Persian student at Weber State College, made preparation to terminate his tenancy of room

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119, Warren Apartments, in Ogden City, Utah. He took his friend, defendant Farhad Soroushirn, to the manager's officer to introduce him and to tell the manager that Mr. Soroushirn would come by later to pick up his belongings and turn in Mr. Tawakoli's key to the apartment. The office was closed. (Tr 99)

Without further delay Mr. Soroushirn, together with Hatsan Rafetti, transported Mr. Tawakoli to the Salt Lake City Airport. Prior to boarding his 10:30 a.m. flight to Persia, Mr. Tawakoli gave Mr. Soroushirn the key to his apartment and asked him to remove his belongings from room 119 and to put the same into storage until his return. (Tr 98)

Sometime after 9:00 a.m. on the same morning, a cleaning lady, thinking the apartment was empty, and by means of a master key (Tr 38) entered Mr. Tawakoli's room at the Warren Apartments. She observed that the room had not been vacated and that a TV set, luggage, and other personal effects remained. (Tr 33) The matter was referred to the apartment managers who later on in the day decided to make an "inventory" of what items were in the apartment. (Tr 34)

The cleaning lady and one of the managers returned to the apartment and began an inventory of all items in the apartment. While searching the apartment, they encountered a small plastic baggie in a cupboard drawer. (Tr 40) Becoming suspicious of its contents, they called two police officers, living in room 128 of the apartments, for advice. (Tr 36)

Ogden City Police Officer Joseph William O'Keefe Jr. and Ogden Reserve Officer James Robert McKinley responded to their call. (Tr 42, 43) Officer O'Keefe opened the baggie and decided it was marijuana. The officer and the apartment manager proceeded to search the boxes and personal effects remaining in the apartment. (Tr 44) In a small box in another closet, they located a second plastic baggie containing what they believed to be marijuana. (Tr 45)

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Officer O'Keefe returned to his apartment to call the "Narcotics Squad". (Tr 45) Officer McKinley was left in charge of the apartment. After waiting about five minutes, he placed the two baggies on the counter, locked the door to the apartment, and drove his wife to her mother's house. (Tr 66, 67)

After Mr. Tawakoli's departure for Persia, Messrs. Soroushirn and Rafetti visited a friend in Salt Lake City for several hours. At about 3:30 p.m. they returned to Ogden and proceeded to Mr. Tawakoli's apartment to gather his belongings and put them into storage as per his request. (Tr 116) Using the key provided them and being unaware of any of the prior happenings in the apartment, they began removing boxes and suitcases from the apartment and placing them in Mr. Rafetti's automobile.

They were observed by Officer O'Keefe and by one of the apartment managers. Officer O'Keefe re-entered the apartment and demanded an explanation as to what each was doing there. Mr. Soroushirn and Mr. Rafetti each explained their mission. (Tr 46, 47)

When the manager returned to the apartment, he exclaimed "the stuff's gone". Officer O'Keefe then demanded Mr. Soroushirn and/or Mr. Rafetti tell him "what happened to the marijuana". When each indicated he had no idea what the officer was talking about, he identified himself by showing his "police identification" and gave them a "Miranda warning". (Tr 48)

Officer O'Keefe then had Mr. Soroushirn and Mr. Rafetti go to Mr. Rafetti's vehicle and remove all of the items Mr. Rafetti had placed in the vehicle and return them to the apartment. (Tr 50) Defendant was advised by Officer O'Keefe that he had been in the apartment fifteen minutes earlier and that when he left, there was marijuana in the room and that defendant was a suspect in "an official police investigation". (Tr 59)

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At some unspecified point, Reserve Officer McKinley returned to the apartment and a search of the apartment was made. Officer McKinley, after searching one of the boxes in the apartment exclaimed "I found it" and brandished two small plastic bags which he claimed to have removed from a tape recorder in the box. (Tr 61, 68)

McKinley, in street clothes and without identifying himself as an officer, demanded that defendants explain to him what happened. When Mr. Soroushirn declined to talk to him, McKinley made a "citizen's arrest" and Mr. Soroushirn was taken into custody. (Tr 78, 79)

POINT I

THE TRIAL COURT ERRED BY ADMITTING EXTRA JUDICIAL STATEMENTS OFFERRED IN VIOLATION OF DEFENDANT'S PRIVILEGE AGAINST SELF INCRIMINATION

Prior to trial, defendant moved to suppress all oral statements, admissions, or confessions obtained in violation of his rights as enumerated under the V and XIV Amendments of the Constitution of the United States and Article 1, Section 12 of the Utah State Constitution. (R 18) The motion was heard and denied prior to trial. (Tr 4-16)

Officer McKinley sought to interrogate Mr. Soroushirn while at the Tawakoli apartment. He consealed his identity as a Reserve Officer and State Liquor and Narcotics agent. (Tr 65) He identified himself only as a janitor-maintenance man for the Warren house. (Tr 77) After Officer O'Keefe had reportedly given a "Miranda Warning", Officer McKinley demanded of defendant "Well, do you want to explain to me what happened". When Mr. Soroushirn replied "no, I don't want to talk to you", Officer McKinley turned to Officer Soukai and in defendant's presence stated, "I would like to sign a complaint against him. Then we will find out the truth". (Tr 9-10) He again asked defendant if he wanted to talk to him. Again Mr.

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Soroushirn declined. Officer McKinley then made a "citizen's arrest" and had Mr. Soroushirn transported to jail still believing he was arrested by a janitor. (Tr 79)

After posting bail Mr. Soroushirn returned to the Warren Apartments to retrieve his friend's belongings. He encountered Officer McKinley. Still believing the officer to be a janitor, he inquired, "Why did you do this to me brother?" Officer McKinley, still bent on concealing his identity, coyly replied, "Well, if you had been truthful with me, it may not have gotten this far". (Tr 72)

The officer then launched into a full scale interrogation of the defendant without benefit of Miranda Warning or notice of his police identity. (Tr 77) As a result of this interrogation, the officer was allowed to tell the jury that Mr. Soroushirn (1) admitted owning the tape recorder in which the marijuana was found, (2) denied owning the marijuana and (3) admitted putting the marijuana in the tape recorder. (Tr 74)

Officer McKinley's action seems calculated to coerce, confuse, deceive and trick Mr. Soroushirn into making an incriminating statement. Mr. Soroushirn interpreted the officer as saying he was being prosecuted because he "told a lie". (Tr 119)

Before any statements are admissable, the state has the burden of proving they were voluntarily given. State v. Dunkley, 85 Utah 546, 39 P. 2d 1097. The United States Supreme Court has stated "moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will of course, show that the defendant did not voluntarily waive his privilege". Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Officer McKinley's own testimony discloses (1) that he twice threatened to sign a criminal complaint if defendant didn't tell him what happened, (2) made a "citizen's arrest" of defendant after defendant's second refusal to discuss the matter, (3) concealed his identity as a police officer, (4) misrepresented his interest in the

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case as that of a janitor, (5) implied that if defendant talked with him that charges might not go any farther, (6) continued to press defendant for damaging information after having been told twice before that the defendant did not desire to discuss anything with him, (7) fastidiously avoided giving defendant any Miranda type warnings during either interrogation under the assumption "that he...wasn't obligated to, not as a citizen". (Tr 77)

McKinley's assertion that he need not be concerned with Miranda Warnings because he was acting as a "citizen" exposes the contempt the prosecution displayed for defendant's right against self incrimination. McKinley, in addition to being a Reserve Ogden Police Officer, was a State Liquor and Narcotics under cover agent. (Tr 65) He controlled the investigation and prosecution of the case from the outset in that (1) he made the initial search of the apartment, (2) discovered the second bag of marijuana, (3) took charge of the apartment while waiting for the "narcotics squad", (4) conducted a second search of the apartment and its contents, (5) located what was believed to be the missing marijuana inside defendant's tape recorder, (6) sought to interrogate Mr. Soroushirn and (7) arrested the defendant. Since when does one's constitutional rights depend on whether or not an investigating officer claims to be acting "under cover" and as a "citizen"?

The unreliability of Officer McKinley's translation of the statements attributed to Mr. Soroushirn should have been enough in and of itself to exclude the statements. Mr. Soroushirn admittedly spoke very broken English at the time of his interrogation. (Tr 6) He took the stand and denied making the statement as attributed to him by the officer. (Tr 119, 120) Officer McKinley made no reports of his investigation or of the defendant's statements. The statements were never reduced to writing, and the officer made no notes of his conversation. He was unable to state exactly what was said. (Tr 87, 88)

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The prosecution argued that Mr. Soroushirn initiated the conversation, complained of and that the damaging admissions were made after his release from custody, and therefore his statements were not protected by Miranda. It should be noted that the U. S. Supreme Court in Miranda, Supra stated:

> "The prosecution may not use statements... stemming from custodial interrogation unless it demonstrates the use of procedural safe guards to secure the privilege against self incrimination", at 444 [emphasis added]

It can be fairly inferred from the record that the statement complained of "stemmed" directly from the earlier custodial interrogation and the threats and misrepresentations attended thereto. There is little doubt that Officer McKinley sought to circumvent the Miranda Warnings by deliberately directing and designing his questioning to uncover damaging evidence against defendant in the forthcoming trial. Furthermore all was done after the defendant had twice told him he did not wish to discuss the incident with him and after the officer had misrepresented his interest in the case and had given no Miranda Warning.

The U. S. Supreme Court has stated that courts should indulge every reasonable presumption against a waiver of any fundamental constitutional right rather than presume acquiescence in the loss. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) at page 1466. Even in a state court proceeding, the effective waiver of a federal right is governed by Federal Standards. Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). In summary, it is submitted that the trial court erred in allowing the testimony of Officer McKinley to be placed before the jury. The state offerred no substantial evidence as to the voluntariness of the statements attributed to defendant. On the other hand, the record is frought with examples of coersion, misrepresentation and trickery. The fact that there was no written record of these statements and that

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the officer testified from memory as to what he thought he heard a Persian speaking broken English say several months earlier, raises further questions. The defendant's denial of the statements when added to the already complicated factual situation gives compelling proof that the statements should have been suppressed.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE

Prior to trial, defendant moved to suppress any items of evidence taken from defendant's possession at room 119, Warren Apartments on the grounds that the same were seized in violation of his constitutional rights under the IV and XIV Amendments of the U. S. Constitution and Article 1 Section 14 of the Constitution of the State of Utah. The motion was denied. (Tr 16)

Officers O'Keefe and McKinley preformed several searches. All were made without warrants. The first search of the apartment was made at the request of the apartment management with the apparent belief the apartment was vacant. It is not this search wherewith the appellant takes issue.

After the first search was completed, the officers locked the apartment and vacated the premises. When they later returned, the apartment was occupied by Messrs. Soroushirn and Rafetti. Possessory rights to the apartment had been transferred to them by Mr. Tawakoli for the purpose of removing his belongings and putting them into storage. The officers were fully advised. (Tr 46)

Despite this, Officer O'Keefe entered the apartment, ordered the return of all boxes previously taken from the apartment and placed in the automobile and proceeded to search all items of personalty in defendant's possession and/or under his control. Officer McKinley searched defendant's tape recorder and after removing its cover discovered the contraband in question. (Tr 68)

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It is acknowledged that perhaps the apartment manager could and did consent to the earlier search of the apartment. However, the search of the items of personalty under the defendant's control both in the apartment and in the automobile, is a different matter. The apartment management had no claim over these items and no right to consent to the search. Furthermore, the officers never requested or received the consent of Messrs. Soroushirn or Rafetti to make any additional searches. Accordingly, the search of the tape recorder and the seizure of its contents without a warrant and/or defendant's consent was in violation of his constitutional rights against unreasonable searches and seizures and defendant's motion to suppress these items from evidence should have been granted. Map v. Ohio, 367 U.S. 643, 6 L Ed. 2d 1081, 81 S. Ct. 1684.

CONCLUSION

The trial court erred in refusing to suppress the extrajudicial statements given by the accused in violation of Constitutional rights against self incrimination and in refusing to suppress evidence obtained as a result of warrantless search of the accused's belongings.

Respectively Submitted

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